

ORIGINAL

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 86-440
	)	
ACHERNAR BROADCASTING COMPANY	)	File No. BPCT-860410KP
	)	
and	)	
	)	
LINDSAY TELEVISION, INC.	)	File No. BPCT-860410KP
	)	
For Construction Permit for a new	)	
Television Station, Channel 64,	)	
Charlottesville, Virginia	)	

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

CONSOLIDATED OPPOSITION TO UNLAWFUL FILINGS BY W19BB

1. The pleadings and application filed by the licensee of television translator station W19BB in Charlottesville are unauthorized, repetitious and abusive, reflecting a certain arrogance on the part of this particular representative of the public television community. We refer to a "Supplement to Shenandoah Valley Educational Television Corporation's [Informal] Comments in Opposition" (the "Supplement"), a letter purporting to tender an FCC Form 340 (the "Application") and a "Motion to Enter Citizen Comments into the Record" (the "Motion").

## I.

Background

2. Achernar Broadcasting Company ("Achernar") and Lindsay Television, Inc. ("Lindsay") at the turn of the century will be entering the 14th year of their quest for the opportunity to construct and operate Charlottesville's second local commercial television station.<sup>1</sup> Charlottesville is one of the few

<sup>1</sup> As the caption reflects, their applications were filed in April 1986.

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television markets in the nation that has but a single commercial television station available to provide local programming services as well as programming of national commercial networks such as CBS, NBC, ABC and Fox.

3. W19BB, which has never been a party to this proceeding, translates the programming of its parent public television station licensed to Staunton, Virginia, lock, stock and barrel. It provides no local television program service to Charlottesville. Moreover, the PBS programming on W19BB substantially duplicates the PBS programming of a public television station in Richmond, Virginia, retransmitted by a satellite station on channel 41 in Charlottesville. Like W19BB, that satellite station provides no local television program service to Charlottesville.

4. W19BB has had more than ample opportunities to file pleadings with the Commission and thus state its views and arguments on the record in a responsible way. The documents filed in accordance with timetables under the Commission's rules and orders in this proceeding are: "Opposition of Shenandoah Valley Educational Television Corp. to Joint Petition for Approval of Settlement Agreement, for Leave to Amend Application and for Immediate Grant of Construction Permit," filed July 1, 1998; "Comments of Shenandoah Valley Educational Television," filed July 28, 1999, in response to an Order issued by John I. Riffer, Assistant General Counsel; and "Reply Comments of Shenandoah Valley Educational Television," filed August 19, 1999.

5. And finally, it must be borne in mind that there are both legislative and judicial interests favoring a conclusion of this mega-year comparative proceeding which W19BB now seeks to block and delay indefinitely for years to come. The legislative interest stems from the Balanced Budget Act of 1997, in which Congress directed the Commission to allow parties to long-pending comparative broadcast proceedings to enter into settlements of those proceedings, and waive agency regulations in order to approve the settlements. 47 U.S.C. §309(l). The judicial interest stems from Achernar Broadcasting Company v. FCC, 62 F.3d 1441 (D.C.Cir. 1995), in which the court remanded this case to the Commission to correct errors in handling the issue of interference to the National Radio Astronomy Observatory ("NRAO"). Given the passage of more than four years and the filing of a further appeal, the agency is currently under a 30-day status report obligation to the Court of Appeals relative to completion of its final resolution of the case. Achernar Broadcasting Co., et al v. FCC, et al, No. 98-1521 (D.C.Cir.).

## II. Supplement and Application

6. W19BB's egregiously late and legally impermissible supplement and "application" can be designed for only one purpose: to delay resolution of this proceeding to permit W19BB's continued secondary use of channel 19 in Charlottesville. This transparent effort to perpetuate its own interests at the expense of the public interest is a clear abuse of the Commission's processes. As such, Shenandoah Valley Educational Television

Corporation, the licensee of W19BB, should be admonished and sanctioned.

7. W19BB wants the Commission to allow it to file a mutually exclusive application with those of Achernar and Lindsay, or perhaps the merged entity of Achernar-Lindsay, and start the process all over again. This of course would have to be accomplished in an environment for which the Commission has not even established comparative ground rules, i.e., how to choose between a commercial applicant and a noncommercial applicant seeking the same broadcast frequency. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, 13 FCC Rcd. 15920, 15930 (¶25) (1998).

8. W19BB argues that it has acquired rights for competitive consideration at this 13th-year juncture of the case by virtue of the Commission's recent public notice regarding applicants for new stations in the 60-69 channel band who are eligible to seek another frequency in the core 2-59 channel band. Mass Media Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations, DA 99-2605, released November 22, 1999 (the "Window Notice"). As material here, the "certain pending applications" to which reference is made in the title of the notice are "applications for new full-service NTSC television stations that were filed on

or before September 20, 1996, or applications filed after that date in response to a valid cutoff list." W19BB did not have an application pending in the 60-69 band on or before September 20, 1999. Neither did it file such an application thereafter in response to a valid cutoff list. W19BB is not within the class of parties to whom this public notice was addressed and for whom its provisions were intended.

9. With regard to the class of parties to whom this public notice was addressed and for whom its provisions were intended, the notice reflects a series of policy judgments. As a general matter, parties are to proceed with the request for a changed channel by initiating a rulemaking proceeding under prescribed terms and conditions, e.g., they cannot propose a change in the city of license and there are customized provisions for mutually exclusive applicants depending on whether they settle their cases and/or agree upon a common requested new channel. Window Notice, slip op. at 4. That procedure does not invite or permit new applicants such as W19BB's operator.

10. For the Charlottesville case, the Commission made the following policy judgment: "...there are 2 applications (for channel 64 in Charlottesville, VA) that have been through an extended process of comparative hearing, court appeal, and remand to the Commission. They currently have pending a settlement agreement and an application amendment that specify a different channel. Because of the age and unique history of those applications and because they are currently before the

Commission, the Bureau will not require the filing of a rule making petition." Id., fn. 9.

11. W19BB argues that the Commission should not, indeed, cannot single Charlottesville out for such treatment, that the Commission should, indeed, must require a rulemaking petition. This would take the status quo back at least 13 years to the commencement of the instant comparative proceeding. Given the position advanced by W19BB, the obvious intent of W19BB is that it continue to broadcast on channel 19 while it ties the licensing proceeding in knots for the indefinite future. Perhaps, indeed, W19BB intends to take the status quo back nearly a half-century to revisit the whole matter of the allocation of a second unreserved channel to Charlottesville. Note 9 of the Window Notice of November 22, 1999 reflected a recognition of the extraordinary length of time the Charlottesville proceeding has been pending and an effort to proceed to resolution; W19BB would stand that recognition on its head and seek to use it as an invitation to lever itself into a proceeding in which it has no legal or equitable standing. The audacity of the effort does not alter its illegitimacy.

12. For its astonishing notions, W19BB cites only Section 309 of the Communications Act in a single unanalytical sentence which states -- as though it were true -- that: "Section 309 of the Communications Act...clearly establishes that the procedures for assigning such channels must be competitive proceedings." Supplement at 2, n. 5. What statute book is W19BB reading? Of

course it is not true. Section 309 provides for certain procedures to be followed when two or more applications are mutually exclusive, but does not purport to define the circumstances under which the requisite mutual exclusivity exists. Following well established procedures on that score to which W19BB makes no reference, the applications of Achernar and Lindsay were found to be mutually exclusive, and the door was closed for the filing of other competing applications, in 1986.

13. Nor does Section 309 purport to address the procedure by which the Commission allocates television broadcast channels, a process governed by Section 307 of the Act. Section 307 grants plenary power to the agency to fashion procedures for allotment of radio frequencies. Channel changes occasioned by supervening allocations (such as the reallocation of much of the channel 60-69 broadcast band to public safety and other land mobile uses) are not unusual. In the exercise of its discretion in this area, for example, in the case of Channel 16 of Rhode Island, Inc., 31 FCC2d 574 (1971), the Commission on its own motion and without any rulemaking proceeding acted to modify Channel 16's construction permit to specify broadcast operation on channel 64.

14. Channel 16 of Rhode Island, Inc. is direct legal precedent for the procedure employed here and has a factual similarity to the instant case as well. In Channel 16 of Rhode Island, Inc., the change to broadcast channel 64 was made to permit land mobile operation on channel 16. Here, Achernar and Lindsay are being required to vacate broadcast channel 64 to

permit land mobile expansion and seek substitution of broadcast channel 19. Such a change has the support of the venerable Association of Public-Safety Communications Officials-International, Inc. and the Commission's Mass Media Bureau. In making its unsupported demand for the institution of a rulemaking proceeding, W19BB does not mention Channel 16 of Rhode Island, Inc., which has previously been brought to its attention.<sup>2</sup>

15. For these reasons, the arguments contained in the Supplement should be rejected and the rogue Form 340 application should be dismissed.

### III. Motion

16. As indicated above, W19BB has had multiple previous opportunities, under Commission rules and in response to the Order issued by Mr. Riffer, to present its arguments. It has done so in three legitimate pleadings which set forth the good works attendant to the operation of a public broadcast translator. W19BB and its fine law firm presented that position in a skillful and thorough way. Based on these pleadings, there is no ambiguity about their cause.

17. The problem of W19BB is that the good works attendant to the operation of a public broadcast translator cannot possibly justify aborting a 13-year comparative proceeding and obliterating laws, rules, policies and expectations of the Commission, the Court of Appeals and the Congress, to say nothing

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<sup>2</sup> Consolidated Reply to Oppositions by Achernar and Lindsay, filed July 7, 1998, at 15-16.



of the parties to that proceeding. The further problem of W19BB is that the good works attendant to the operation of a public broadcast translator do not remotely outweigh the public interest benefits of a second commercial television station providing local service to Charlottesville, at the expense of one of two substantially duplicated public television translator/satellite operations providing no local service. Bluntly stated, translator service, as the Mass Media Bureau noted in its pleading, is a secondary service which must yield to a proposed primary service. In apparent acceptance of this verity, W19BB now says, in effect, "given that, let me be an applicant." Unfortunately for W19BB, that option was foreclosed in 1986.

18. Flooding the Commission with a steady volume of repetitive and cumulative statements in support of W19BB does not and cannot change the decisional reality discussed above. While the motion is without merit, W19BB's statements and those solicited for submission are already in the record and no useful purpose would be served by expunging them, irrelevant though they may be.

#### IV.

#### Relief requested

19. We ask the Commission to take final action in this matter at the earliest practical date. Clearly, delay only encourages mischief. Nevertheless, nothing in any of the outlaw filings detracts from the case for approval of the settlement in which the NRAO is protected, the land mobile operations in the Washington-Baltimore area on channel 19 are protected and the

public interest in activation of a second local commercial  
broadcast service in Charlottesville, at long last, is served.

Respectfully submitted,

  
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Katrina Renouf  
Margot Polivy

Renouf & Polivy  
1532 Sixteenth Street, N.W.  
Washington, D.C. 20036  
(202) 265-1807

Counsel for Achnar Broadcasting  
Company

  
\_\_\_\_\_  
Gene A. Bechtel

Bechtel & Cole, Chartered  
1901 L Street, N.W., Suite 250  
Washington, D.C. 20036  
(202) 833-4190

Counsel for Lindsay Television, Inc.

December 16, 1999

CERTIFICATE OF SERVICE

I, Gene A. Bechtel, certify that I have this 16th day of December 1999 caused true copies of the foregoing CONSOLIDATED OPPOSITION TO OUTLAW FILINGS BY W19BB to be served by hand delivery/electronic transmission to, or to be placed in the United States mail, first class, postage prepaid, addressed to, the offices of the following:

\* John I. Riffer, Esq.  
Assistant General Counsel-  
Administrative Law  
Federal Communications Commission  
1919 M Street, N.W., Suite 610  
Washington, D.C. 20554

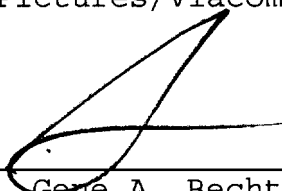
\* James W. Shook, Esq.  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Suite 8210  
Washington, D.C. 20554

Christopher J. Reynolds, Esq.  
P. O. Box 2809  
Prince Frederick, Maryland 20678  
Counsel for National Radio  
Astronomy Observatory

Robert M. Gurss, Esq.  
Wilkes, Artis, Hedrick & Lane, Chartered  
1666 K Street, N.W., Suite 1100  
Washington, D.C. 20006  
Counsel for APCO

Jonathon D. Blake, Esq.  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20044  
Counsel for Shenandoah Valley Educational  
Television Corporation

Ray White, Esq.  
Paramount Pictures, Stations Group  
5202 River Road  
Bethesda, Maryland 20816  
Counsel for Paramount Pictures/Viacom

  
\_\_\_\_\_  
Gene A. Bechtel

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